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No. 92-904

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES I. MCCOY AND SEAVAC INTERNATIONAL, INC.—U.S.A.
Petitioners,

v.

SEAWARD MARINE SERVICES, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the district court and court of appeals correctly held that judgment as a matter of law was proper on the plaintiffs' claim that there had been a violation of the False Claims Act in Seaward's interpretation of its contracts with the United States Navy ("Navy") and claims made thereunder where:

a. the Navy personnel responsible for drafting, interpreting, and administering the contract testified, without contradiction, that the allegedly false claims were not false, but complied with both the letter and spirit of the contract;

b. the plaintiffs failed to produce any evidence that either party to the contract intended or understood the contract to operate or be construed in accordance with the plaintiffs' interpretation; and

c. the plaintiffs failed to produce any evidence that any claim was filed with the requisite knowledge that it was false.

2. Whether the district court and the court of appeals applied the correct standard in determining that judgment as a matter of law was appropriate when it explicitly recognized and applied the standard established by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

ADDITIONAL PARTIES HAVING AN INTEREST IN THE PROCEEDING

In addition to the disclosures contained in the Petition at ii, postjudgment discovery revealed that other parties (although not parties below) are directly interested in the outcome of this petition. The petitioners' costs below were paid by Marine Construction and Design, Inc. ("Marco"), which agreed with petitioner Seavac International, Inc.-USA that Marco would direct the appeal of this case and be reimbursed through any recovery.

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BRIEF IN OPPOSITION FOR RESPONDENT

STATEMENT

The unpublished opinion of the district court and the unpublished *per curiam* opinion of the court of appeals demonstrate that this case was decided in both courts upon the unique factual circumstances in which the case arose. Because the petitioners misstate the factual record, this statement of the case is provided.

Seaward Marine Services, Inc. ("Seaward") has provided specialized underwater ship husbandry and maintenance, nondestructive testing and diving services to the Navy since 1979. Pet. App. 3a. At issue in this case are contracts awarded to Seaward in 1984 and 1989 ("the contracts") to clean the underwater hulls of Navy ships, clean and polish propellers, and perform related underwater ship husbandry tasks as assigned by the Navy. *Id.* The petitioner, Seavac International, Inc.-USA competed

unsuccesfully for the 1989 contract and commenced this action after losing the competition.[1]

Although Seaward provides its services on a worldwide basis, a majority of the tasks are performed on ships in ports in the continental United States. The contracts required Seaward to assure that the necessary divers, crew and equipment were available where and when needed and that Seaward be capable of conducting simultaneous operations at four different locations in each of the two zones established by the contract. JAV 1384. At issue in this petition are the services performed in the East Coast zone covering the North and South Atlantic, the Gulf of Mexico, the European coast, the Mediterranean Sea and the Red Sea.[2]

The contracts obligated Seaward to establish and maintain a base office in Norfolk, Virginia from which all of the East Coast work was directed. Pet. App. 3a. When the Navy requested that work be performed on ships berthed at other ports in the East Coast zone, Seaward arranged for a seven or eight man crew and the required machinery, cranes, tools, diving gear and related supplies to travel to these "remote work sites."

The plaintiffs alleged that Seaward violated the contract by charging the Navy for per diem payments in two circumstances. First, the contracts provided for the payment of per diem for work performed outside Norfolk as follows:

> The Contractor will also be reimbursed for the reasonable and actual subsistence costs (including lodging) incurred after arrival at and prior to departure

---

[1] The other petitioner, Charles I. McCoy, is a terminated former employee of the respondent Seaward and now a paid consultant to Seavac. Pet. App. 2a n.1.

[2] The West Coast zone had a base office in San Diego, California and included the North and South Pacific, the Indian Ocean and the Persian Gulf.

> from a CONUS [Continental United States] remote work site . . . The limitations applicable to subsistence will be in accordance with the Joint Travel Regulations ("JTR") for Department of Defense civilian employees.

Pet. App. 4a.

Seaward's standard practice was to pay a mobile crew diver a flat per diem for each day spent at a remote work site outside of Norfolk regardless of where the individual diver chose to live. The per diem amount varied for each location in accordance with the limitations on daily rates established by the Joint Travel Regulations for Department of Defense Civilian Employees. Pet. App. 4a. According to the plaintiffs, billing the Navy for per diem reimbursement for a mobile crew diver who resided near a remote site where work was being performed was a false claim. Pet. App. 3a.

Second, the contracts established a fixed amount per mile to reimburse Seaward for mobilizing to any remote work site outside Norfolk or demobilizing from a remote site back to Norfolk ("mob/demob"). This per mile fee was "to move the equipment and crew(s) to and from work locations (outside of the normal base of operations) . . . ." Pet. App. 4a. The contract barred the payment of per diem for work performed in Norfolk, and further provided that the contractor "may not incur costs under Line Item 0015 [mob/demob] and Line Item 0018 [subsistence] simultaneously." Pet. App. 16a-17a.

Because the mob/demob fee applied only while the crew was "in transit," Seaward routinely billed the Navy for per diem on the same day that its crew traveled, because the crew was present at the remote site for part of the day and in transit (mob/demob) during part of the day. Pet. App. 5a. Thus, if a mobile crew completed its work in New London, Connecticut on Wednesday, and moved to its next assignment in Newport, Rhode Island (55 miles) on Thursday, Seaward would bill per diem on

Wednesday, mobilization during the travel, and per diem on Thursday once the crew reached Newport. The only time that per diem and mob/demob would not be billed on the same day was when the crew was required to spend the night traveling between work sites or when the crew demobilized from a remote work site to Norfolk, where no per diem payments were permissible.

The Navy was fully aware of the manner in which Seaward paid and billed per diem and mob/demob expenses. The amount of per diem and mob/demob related to each job was recorded on the Navy's Cost Summary Report form which was signed by two representatives of the Navy and a representative of Seaward, and was the basis for Seaward's request for payment. JAXIII 4478.

The entire basis of the plaintiffs' false claim complaint was a construction of the contract different from the construction shared by Seaward and the Navy. According to the plaintiffs the prohibition against billing mob/demob and subsistence "simultaneously" meant that the two items could not be billed on the same day. Pet. App. 5a. They also argued that the contract's reference to the "limitations" in the JTR did more than establish the maximum dollar amount of per diem for each city and somehow incorporated all other substantive provisions of the JTR. Pet. App. 5a. Thus, according to the plaintiffs' theory, any invoice reflecting Seaward's cost of paying per diem to a mobile crew diver having an address in the area where work was being performed was claimed to be fraudulent.

At trial only two witnesses from the Navy with any responsibility for the management and administration of Seaward's hull cleaning contracts testified. The first, the contracting officer, John Vollmer, was called by the plaintiffs. He did not testify that the plaintiffs' construction of the contract was correct, or that mob/demob could not be paid on the same day or that it was improper to pay per diem to divers who lived near a remote work station.

He did not suggest that any request for reimbursement was improper, much less fraudulent. Pet. App. 6a. He further testified that even after the plaintiffs' allegations were made public he had approved the Navy's exercise of an option for another year of Seaward's services and would not have done so unless he believed that Seaward was a "responsible" contractor. (JAII 555)

Mr. Vollmer described Michael Dean, whom the petitioners seek to denigrate (*see, e.g.*, Pet. 5, "civilian project manager," "lacked authority," "interpretations at trial were his own"), as the "hull cleaning czar" (JAII 604), and the "Navy official responsible for overseeing the contract" and for "making sure that the contract is performed properly." (Pet. App. 6a; JAII 603-604.) Mr. Vollmer relied upon Dean to initiate any changes to the contract that might become necessary. (JAII 555)

Michael Dean was called by Seaward. As manager of the Navy's hull cleaning program, and later as the head of the Navy's Underwarter Ship Husbandry Division, he was "involved in all aspects of the hull cleaning program from setting policy, defining the program's goals, objectives, requirements, outlining to the fleet how these requirements should be carried out." (JAIII 1068-69) Mr. Dean was personally responsible for "interpreting the [1984] contract, providing guidance to the contractor, overseeing the contractors' operations" and "wrote [the 1989] contract, and, as the program manager, was responsible for the management of [it]." (JAIII 1070-72)

Mr. Dean unequivocally testified that the billing practices about which the plaintiffs (but not the Navy) complained were fully consistent with the contract he wrote and managed. He testified that he was aware that "Seaward's policy is to pay each diver a flat rate of subsistence" and that the residence of any individual performing work outside of Norfolk didn't matter because "all work performed outside of Norfolk is considered a remote

site and is therefore subject to subsistence cost." (JAIII 1068-69; Pet. App. 6a). Indeed, he described the payment of per diem to a diver who maintained a residence near one of the remote sites as

> a perfectly legitimate requirement. If the work is performed at a remote location outside the Norfolk area, *the Navy understands that we will be billed for subsistence cost regardless of how that individual chooses to live while he is there doing work for the Navy.* (JAIII 1091; Pet. App. 6a). (Emphasis added.)

Dean was equally unequivocal in rejecting the plaintiffs' construction of the contract's provisions concerning the payment of mob/demob and per diem on the same day, testifying that there was no prohibition against billing both on the same day because "provided the contractor gets from one location to the second location in the same day, he may bill, he may very well seek charges for both subsistence and mobilization." (JAIII 1092; Pet. App. 6a). Finally, he testified that after the plaintiffs had complained, he had reviewed Seaward's practices and concluded that "there are no problems;" and did not request Seaward to change its billing practices. (JAIII 1094)

After the jury's verdict, the district court straightforwardly applied the requirements of the False Claims Act, 31 U.S.C. § 3729(a) and (b) to this proof in ruling on Seaward's motion for judgment as a matter of law. The district court determined that the word "simultaneously" in the prohibition against incurring mob/demob and per diem "simultaneously" did not mean "on the same day" and, in any event, the clear testimony of both parties to the contract was that charges on the same day for mob/demob and per diem were permissible under the contract. Pet. App. 6a. Similarly, the district court held that both parties to the contract had agreed and understood that the only applicable provision of the JTR's was the limitation on the maximum dollar amount, so that the

residence of a diver was irrelevant. Pet. App. 7a. Accordingly, the district court granted judgment as a matter of law, and, in the exercise of its discretion, conditionally granted a new trial.

The court of appeals affirmed. Recognizing that the appropriate standard to be applied to the grant of a motion for judgment as a matter of law was the now familiar standard of *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the court of appeals focussed on the requirement that a *qui tam* plaintiff prove that the defendant "*knowingly* presented . . . a false or fraudulent claim. . . ." Pet. App. 7a-8a. Holding that it would be "unthinkable" that a contractor's billings which were consistent with the government's and the contractor's interpretation of the contract could be a false claim the court of appeals held that the plaintiffs had failed to prove the essential element of "knowingly" submitting a false claim. Pet. App. 8a. After considering the same evidence and arguments petitioners repeat here, the court of appeals rejected their arguments that a snippet of testimony misleadingly taken from context revealed a conflict in the testimony of Seaward's president, Pet. App. 9a n.5, and that a single conversation by one supervisor with a single diver represented Seaward's "true" interpretation of the contract. Pet. App. 9a n.5. The court of appeals also rejected the argument that the jury could base a finding on a summary exhibit which "summarized" facts different from the testimony of the witness who made the original entries being summarized and who was the only witness that testified as to the meaning of those facts. Pet. App. 9a nn.5-6. Accordingly, the court of appeals affirmed.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS' UNPUBLISHED, *PER CURIAM* OPINION IS DEPENDENT UPON A UNIQUE SET OF FACTS THAT ARE EXTREMELY UNLIKELY TO REOCCUR.

The decision of the court of appeals is both *per curiam* and unpublished, factors which suggest the lack of importance of the case to anyone other than the parties. Because the court of appeals' decision is unpublished (Pet. App. 1a), it is not even binding precedent within the Fourth Circuit. *See* Internal Operating Procedures of the United States Court of Appeals for the Fourth Circuit 36.5 and 36.6 (absent unusual circumstances the Fourth Circuit "will not cite an unpublished disposition in any of its published opinions or dispositions," and citation in briefs or oral argument "is disfavored.") Accordingly, the likelihood that the court of appeals' decision will influence the decision of any future case in the Fourth Circuit, much less any other circuit, is extremely remote.

Moreover, the factual circumstances in which this case arose are so unique as to virtually guarantee that the issues presented and quite correctly decided by this case will never reoccur. Rarely—and for good reason—will a disappointed bidder for a government contract, even a well financed bidder, pursue and attempt to litigate an interpretation of a contract that is shared *neither* by the government *nor* the contractor. Moreover, it is extraordinarily unlikely that any future False Claims Act case will have the government officials responsible for writing, interpreting, and managing the contract testify, as Messrs. Dean and Vollmer did here, that the contractor's interpretation of the contract was not only not fraudulent but was the *correct* one. Accordingly, it is not surprising that the petitioners have failed to identify any False Claims Act decision which even arguably employs a different substantive standard than was applied here. None exists nor is ever likely.

II. THE COURT OF APPEALS ESTABLISHED NO NEW OR INCORRECT SUBSTANTIVE OR PROCEDURAL STANDARD.

A. The Court Of Appeals Neither Created Nor Misapplied A "Doctrine Of Practical Interpretation."

The petitioners' assertion that the court of appeals' decision "extends to Federal contract law the equitable doctrine that courts should not disturb the 'practical interpretation' of the parties to a contract," (Pet. 9) underscores petitioners' refusal to understand the issue which was litigated in this *qui tam* case. As the district court and the court of appeals both recognized, Pet. App. 7a-9a, the proper issue was not an abstract interpretation of the contract, or even how the contract would be interpreted if one of the parties to the contract asserted the construction the petitioners asserted. Instead, the issue was whether, in light of the fact that both Seaward and the government interpreted the clauses at issue in the same way, the petitioners had proved the essential element that Seaward had "knowingly" filed a false or fraudulent claim for payment by the government. Pet. App. 7a.

The district court and the court of appeals made clear that each had used Dean's testimony and the parties' consistent course of dealing as evidence of the correct interpretation of the contractual provisions which underscored the plaintiffs' failure to prove that Seaward knowingly filed a false claim. By citing *Management Systems Associates, Inc. v. McDonnell Douglas Corp.*, 762 F.2d 1161 (4th Cir. 1985) (Pet. App. 8a, 19a) both courts did no more than recognize the unremarkable proposition that the "practical interpretation" by the parties of a contract provision of assertedly doubtful meaning ordinarily provides "great, if not controlling, influence" in construing its meaning. There is neither a conflict among the circuits nor a suggestion by any commentator that it is inappropriate to look to the manner in which the parties conducted themselves in determining the meaning of an assertedly

ambiguous provision. Indeed, this Court's recognition of that common sense proposition in *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100 (1913), has been applied in such diverse contexts as the Uniform Commercial Code § 2-208 (". . . any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement"), and in court of claims decisions interpreting contested contractual provisions. *See Central Engineering & Construction Co. v. United States*, 59 F. Supp. 553, 565 (Ct. Cl. 1945) ("The interpretation of a contract by the parties to it before it becomes the subject of controversy is deemed by the courts to be of great, if not controlling, weight.").

B. The Courts Below Never Purported To Estop The Government.

Relying upon a wildly inapposite melange of cases, the petitioners seek to suggest that the courts below somehow estopped the government in circumstances where other circuits would not. They are wrong for three reasons. First, the court of appeals *never* purported to estop the government [3]—indeed there was no opportunity to do so because the government was neither a participant in the suit *nor* did it try to assert a position at trial any different from its consistent earlier position that Seaward's billings were completely appropriate. Second, Michael Dean, the person who the petitioners claim created the

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[3] The district court correctly recognized that "[w]hile the [False Claims] Act is civil in name, it is punitive in nature." Pet. App. 19a. Granting a private claimant the ability to impose crippling, punitive sanctions because the private claimant believes a governmental official has erred in his or her interpretation of a contract is substantially different from permitting the government to avoid being estopped in an attempt to recover funds that should never have been paid to the defendant in the first place. Nonetheless, the petitioners' suggest that the same rules should apply in this *qui tam* case as in a contract dispute and that the "result herein should not differ simply because the action is prosecuted by *qui tam* relators on behalf of the Government [sic]." Pet. 12.

alleged estoppel without authority, was not only acting within his authority, he was the "hull cleaning czar," the person who wrote the 1989 contract, was responsible for the management of it, and provided guidance to the contractor. JAIII 1070-72. Moreover, Mr. Dean expressed a view of the contract consistent with the contracting officer (Vollmer) who the petitioners concede could bind the government. Thus, Seavac's reliance on cases where the government officer lacked authority, *Heckler v. Community Health Services, Inc.*, 467 U.S. 51 (1984); *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); *United States v. Killough*, 848 F.2d 1523 (11th Cir. 1988); *Strauch v. United States*, 637 F.2d 477 (7th Cir. 1980); *Bornstein v. United States*, 345 F.2d 558 (Ct. Cl. 1965), is wholly misplaced. This is not a case where Seaward erred in relying on an official clearly lacking authority, or in which the person petitioners claim should have been consulted had a different understanding. Third, because the courts below never considered the issue of whether the government should be estopped, it is not possible to compare the court of appeals' reasoning with that of other courts.

III. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD IN REVIEWING THE DISTRICT COURT'S DECISION AND THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING APPELLATE REVIEW OF A JUDGMENT AS A MATTER OF LAW.

The court of appeals specifically recognized that the standard for granting judgment as a matter of law was the standard expressed by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986):

> The standard for granting a judgment as a matter of law is essentially the same standard as that used for granting summary judgment. In discussing the relevant inquiry on motion for summary judgment and motion for directed verdict, the Supreme Court stated: 'the primary difference between the two

> motions is procedural . . . In essence, though, the inquiry under each is the same; whether the evidence presents sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law.' [*Anderson*] *v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)." Pet. App. 7a.

The court of appeals' application of *Anderson* was straightforward. In an effort to manufacture an issue, Seavac asserts that the court of appeals adopted a unique approach to reviewing a grant of judgment as a matter of law that conflicts with other circuits. Seavac tortures this argument from a portion of a sentence in footnote 5 to the panel's opinion, which in full reads:

> We agree with the district court, however, that a *comprehensive reading* of Armstrong's testimony allows only one construction, *i.e.*, that Armstrong interpreted the Contracts to permit same day charges and per diem reimbursement for divers residing near the remote site." Pet. App. 9a n.5 (emphasis added).

The court of appeals' reference to a "comprehensive reading" is unquestionably a reference to the fact that it was reading the entire exchange between Seaward's president and plaintiffs' counsel—not the exchange which plaintiffs misleadingly sought to create by editing it.[4] By

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[4] The full exchange involving the billing of mob/demob and *per diem* on the same day was:

> Q. Didn't Mr. Dean agree with your opinion or your policy at Seaward that it would be improper for Seaward to bill the government for demobilization charges on the same day that per diem charges were being billed and incurred?
>
> A. Yes.
>
> Q. And isn't that in fact the policy of Seaward?
>
> A. What?
>
> Q. Not to bill per diem and demobilization charges on the same day?
>
> A. Yes.
>
> Q. *Isn't that not only the policy of Seaward, but also Seaward's contract interpretation?*

[Continued]

taking the "comprehensive reading" language out of context, petitioners erroneously seek to suggest that the panel's reasonable and customary requirement that an answer of a witness must be read in context constitutes an improper *weighing* of the evidence in the case. *Cf. Anderson, supra*, 477 U.S. at 255. The court of appeals undertook no weighing or credibility determination—it simply and properly required that a witness' entire answer be read. *Anderson* establishes that the inquiry is "whether *the evidence* presents sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law." 477 U.S. at 251 (emphasis added). There was no such disagreement. Indeed, as both lower courts found, the evidence was so one-sided that the defendants were entitled to prevail as a matter of law. The court of appeals' requirement that the testimony be read fairly—or "comprehensively" in the sense that it not be misleading excerpted—did no more than prevent the plaintiffs from arguing that the verdict was supported by a piece of evidence that did not exist.

Finally, Seavac's argument that there are conflicts among the circuits regarding the standard of appellate review from a judgment as a matter of law is not only irrelevant to the determination of this case but wrong. Surely, no conflict exists with the court of appeals' re-

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[4] [Continued]

A. *I think—did you just say the policy not to bill demob to Norfolk and subsistence on the same day?*

Q. *Correct. Isn't that the policy?*

A. *That's the policy, yes.*

Q. Isn't that also Seaward's contract interpretation of the hull cleaning contract?

A. Yes. (JAII 733-34; emphasis added.)

In the district court the petitioners misleadingly omitted the underscored language. Pet. App. 21a. The underscored language was critical because it made clear that the answer was in the context of a return to Norfolk where *per diem* was not permitted.

quirement that testimony be fairly read. After *Anderson*, there appears to be no *substantive* split among the other circuits.[5]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] Most of the cases upon which petitioners rely precede *Anderson*. Pet. 16-19 nn.8-24. None suggest that any different formulation of the standard would have influenced the outcome.